

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JEAN EBEL)	
Claimant)	
VS.)	
)	Docket No. 247,085
JACK SMITH SHOE SHOP)	
Respondent)	
AND)	
)	
STATE FARM FIRE & CASUALTY COMPANY)	
Insurance Carrier)	

ORDER

Claimant and the respondent and its insurance carrier appealed the November 19, 2001 Award entered by Administrative Law Judge Nelsonna Potts Barnes. The parties waived oral argument that had been scheduled for May 10, 2002, in Wichita, Kansas.

APPEARANCES

Dennis L. Phelps of Wichita, Kansas, appeared for claimant. Gary K. Albin of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for a February 17, 1999 accident in which claimant injured her right third and fourth fingers, commonly called the ring and little fingers.

In the November 19, 2001 Award, Judge Barnes determined claimant sustained a 10 percent functional impairment to the right little finger. The Judge also concluded that respondent and its insurance carrier had paid claimant \$230.58 in temporary total disability

benefits and \$2,948.20 in temporary partial disability benefits to which claimant was not entitled. The Judge ruled that respondent and its insurance carrier could request reimbursement of the temporary total disability benefits from the Workers Compensation Fund (Fund) under K.S.A. 1998 Supp. 44-534a. Regarding the overpaid temporary partial disability benefits, the Judge found that respondent and its insurance carrier were entitled to receive a credit against the permanent disability benefits due claimant for the finger injury, which the Judge determined to be \$549. Finally, the Judge ruled that the balance of the overpaid temporary partial disability benefits remaining after the credit (\$2,399.20) could not be collected from either the claimant or the Fund.

Claimant contends the Judge erred. Claimant argues she is entitled to receive permanent partial disability benefits for an eight percent functional impairment to the right hand as she permanently injured both her ring and little fingers and that is the rating provided by the fourth edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (AMA Guides). Claimant agrees that respondent and its insurance carrier should receive a credit against her permanent disability award for the \$230.58 in temporary total disability benefits that were overpaid. But claimant disputes that respondent and its insurance carrier should receive a credit for the mistaken payment of temporary partial disability benefits. Accordingly, claimant requests the Board to modify the Award by granting her permanent disability benefits for an eight percent functional impairment to the hand, less \$230.58 that was overpaid in temporary total disability benefits.

On the other hand, respondent and its insurance carrier contend the Judge erred by holding that they could not seek reimbursement from the Fund for the overpayment of the temporary partial disability benefits. Accordingly, they request the Board to order the Fund to reimburse them for any and all benefits that they have overpaid.

The issues before the Board on this appeal are:

1. What is the nature and extent of claimant's injury and disability?
2. Are respondent and its insurance carrier entitled to receive a credit against the permanent disability benefits for the temporary total disability and temporary partial disability benefits that were overpaid?
3. What is claimant's award of permanent disability benefits after applying all appropriate credits?
4. Should the Board order the Fund to reimburse respondent and its insurance carrier?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Board finds and concludes:

1. On February 17, 1999, claimant injured her ring and little fingers on her right hand when her hand was pulled into a sanding machine. The accident broke the little finger and, according to claimant, pulled the ligaments and muscles in the ring finger. The accident arose out of and in the course of employment with respondent, a shoe repair shop.

2. As a result of the accident, claimant sustained a five percent functional impairment to the ring finger and a 70 percent functional impairment to the little finger as rated by the fourth edition of the *AMA Guides*. That rating is based upon the testimony of Dr. Pedro A. Murati, who was hired by claimant to provide a functional impairment rating in this claim.

The Board adopts Dr. Murati's functional impairment opinions over those provided by Dr. Robert Eyster. The record is clear that Dr. Murati considered claimant's ongoing symptoms and the range of motion in both of claimant's injured fingers. On the other hand, Dr. Eyster did not know if he had measured the range of motion in claimant's ring finger and had no notes regarding the symptoms or complaints that claimant had in that finger. Dr. Eyster, however, did admit the ring finger would have a functional impairment if there was lost range of motion. Finally, Dr. Eyster testified that he did not realize that claimant had an enlarged knuckle on her right ring finger that had not resolved since the accident. When considering the entire record, the Board is persuaded that Dr. Murati gave claimant a more thorough evaluation for rating purposes.

3. Claimant is entitled to receive permanent partial disability benefits for a scheduled injury to the ring finger and a scheduled injury to the little finger. K.S.A. 1998 Supp. 44-510d(a)(4) and (5) provide that a maximum of 20 weeks of benefits should be paid for an injury to the ring finger and a maximum of 15 weeks of benefits should be paid for an injury to the little finger. Accordingly, claimant is entitled to receive one week of permanent disability benefits for the five percent functional impairment to the ring finger and 10.5 weeks of permanent disability benefits for the 70 percent functional impairment to the little finger.¹

4. Claimant requested permanent disability benefits for an eight percent functional impairment to the right hand as the *AMA Guides* suggest that impairments to the fingers be converted to a rating to the hand. Although the *AMA Guides* provide for such conversion, K.S.A. 1998 Supp. 44-510d does not. That specific statute controls.

¹ See K.A.R. 51-7-8.

5. Respondent and its insurance carrier are entitled to receive a credit for all the temporary total disability and temporary partial disability benefits that were paid in this claim. The parties do not challenge the Judge's determination that claimant was overpaid \$230.58 in temporary total disability benefits and \$2,948.20 in temporary partial disability benefits. The Workers Compensation Act provides that a credit shall be given in a final award for all the compensation paid by the employer and its insurance carrier before that award. K.S.A. 1998 Supp. 44-525(b) provides:

No award shall be or provide for payment of compensation in a lump sum, except as to such portion of the compensation as shall be found to be due and unpaid at the time of the award, or except at the discretion of the director on settlement agreements, **and credit shall be given to the employer in such award for any amount or amounts paid by the employer to the employee as compensation prior to the date of the award.** (Emphasis added.)

That statute does not differentiate between payments labeled as temporary total disability benefits, temporary partial disability benefits, or some other designation.

6. Respondent and its insurance carrier request the Board to order the Fund to reimburse them for any overpayment of benefits. As indicated below, the modified award is greater than the combined amounts of the temporary partial disability and temporary total disability benefits that have been previously paid. Accordingly, there is no overpayment of benefits to support a request for reimbursement.²

AWARD

WHEREFORE, the Board modifies the November 19, 2001 Award, as follows:

Jean Ebel is granted compensation from Jack Smith Shoe Shop and its insurance carrier for a February 17, 1999 accident and resulting disability. Based upon an average weekly wage of \$576.40, Ms. Ebel is entitled to receive one week of permanent partial disability benefits at \$366 per week, or \$366, for a five percent permanent partial disability to the right third finger, plus 10.5 weeks of permanent partial disability benefits at \$366 per week, or \$3,843, for a 70 percent permanent partial disability to the right fourth finger, making an award of \$4,209. Respondent and its insurance carrier are entitled to receive a credit for the temporary total disability benefits of \$230.58 and the temporary partial disability benefits of \$2,948.20 that were previously paid.

² Although it is not applicable in this case, all requests for Fund reimbursement should be made to the Director of the Division of Workers Compensation, who is statutorily charged with certifying to the commissioner of insurance the amounts to be reimbursed. See K.S.A. 1998 Supp. 44-534a.

Accordingly, claimant is entitled to receive a net award of permanent disability benefits in the sum of \$1,030.22 (\$4,209 minus \$230.58 and \$2,948.20), which is all due and owing.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of June 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dennis L. Phelps, Attorney for Claimant
Gary K. Albin, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Workers Compensation Director